Office - Supreme Court, U.S.
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JAN 28 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1021 and 81-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE ZINSER, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

EDGAR CLEVELAND, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Court should reconsider its landmark decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and overturn the dismissal of the price-fixing claims of petitioners whose asserted injury resulted from the indirect "passing-on" to them of allegedly depressed wheat prices through the wheat distribution chain.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

This brief in opposition is submitted by Clarence Palmby and Continental Grain Company, respondents in nos. 81-1021 and 81-1036; and Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Inc., and Garnac Grain Co., Inc., respondents in no. 81-1036 only.*

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* Statements of the corporate parties pursuant to Rule 28.1 of this Court are contained in the Appendix to this brief.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 660 F.2d 754, and contained in the appendices to the petitions. The opinions of the District Court, which are not officially reported, are appendices C and D to the petition in no. 81-1036, and reproduced at pages 22a-49a in the appendix to the petition in no. 81-1021.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

Four years ago, in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), this Court held that antitrust plaintiffs may not recover for alleged injury initiated by defendants who did not deal directly with them, and "passed-on" to plaintiffs through middlemen in the distribution chain. At the same time, the Court rejected all "attempts to carve out exceptions" to its holding for particular litigants or particular markets. *Id.* at 744.

Petitioners here seek review of one of the many subsequent lower court decisions which have routinely applied *Illinois Brick* to dismiss such indirect "pass-on" claims. However, they are unable to demonstrate that the lower courts have encountered any significant difficulties in applying the straightforward *Illinois Brick* rule, or to identify a disagreement among the circuits on any issue relevant to this case. Instead, petitioners urge this Court in effect to reconsider the issues resolved in *Illinois Brick,* reintroduce to antitrust litigation the unfairness and complexity which *Illinois Brick* eliminated, and expand the reach of the antitrust laws.

These cases arise from the well-known export sales of American wheat to Russia in the summer of 1972. Petitioners—southwestern wheat farmers—allege a massive conspiracy involving top government officials and the respondent grain exporters to suppress information concerning the sales. Neither the comprehensive investigations of the sales by a half-dozen federal

agencies and two Congressional committees (which exonerated the respondents), nor exhaustive discovery undertaken in this case, has produced any evidence to support petitioners' fanciful claim of conspiracy.

According to petitioners, the purpose and effect of the "conspiracy" was to reduce the price which respondent exporters paid to grain elevators in acquiring wheat for export to Russia. As a result, petitioners claim, farmers received an "artificially low" price when they in turn sold their crops to the grain elevators. The farmers seek to recover not from the grain elevators—to whom they sold and by whom they allegedly were paid an "artificially low" price—but from the respondent exporters at the other end of the chain of distribution.

Without reaching the dubious merits of these claims, both the District Court and the Court of Appeals found with no hesitation that petitioners alleged precisely the kind of indirect, "pass on" injury barred by *Illinois Brick*. Accordingly, even were this Court inclined to consider the application of *Illinois Brick* in a context where the facts and concerns which motivated that decision are not in evidence, this is not such a case.

Nor should this Court accept petitioners' invitation to reconsider the principles underlying *Illinois Brick*. The lower courts have applied the pass-on rule in a consistent manner, and Congress has declined to change it.* Indeed, the *Illinois Brick* decision received favorable comment from this Court just last term, when it refrained from creating a right of contribution in antitrust cases, in part because of the complications such a rule would add to "what already is complex litigation." *Texas*

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* Legislation to overturn this Court's *Illinois Brick* ruling was introduced in the 95th and 96th Congresses. *See* S. 300, 96th Cong., 1st Sess. (1979); S. 1874, 95th Cong., 2d Sess. (1978); H.R. 11942, 95th Cong., 2d Sess. (1978). Petitioner Cleveland and other wheat farmers testified in support of the legislation and told Congress that their claims in this action would fail unless *Illinois Brick* were overturned. Fair and Effective Enforcement of the Antitrust Laws, Hearings on S. 1874 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 95th Cong., 2d Sess. 424 (1978). Congress did not enact the legislation.

Industries, Inc. v. *Radcliff Materials, Inc.*, ____ U.S. ____, 101 S. Ct. 2061, 2065 (1981).

These cases present no significant legal problem or recurring factual situation which merits this Court's attention. The petitions should be denied.

B. Statement of Facts

Petitioners are farmers who sold wheat during the period from May 1 until September 1, 1972.* They allege that respondents, six grain exporters and one individual, conspired to fix wheat prices during that period by suppressing information regarding the prospects for, and later the fact of, the 1972 sales of American grain to the Soviet Union. Petitioners claim that this alleged conduct constituted a conspiracy to fix prices and a per se violation of Section 1 of the Sherman Act. JA 168-82; 81-1021 Pet. App. 51a-88a.**

The Russian Wheat Sales

Although the history of the Russian wheat sales is not strictly necessary for disposition of these petitions, we provide, as background for the Court, a brief statement of facts developed in extensive discovery in the District Court and in several government investigations of the sales. That evidence es-

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* Three plaintiff classes were initially certified by the District Court, consisting of farmers in the State of Oklahoma (the *Cleveland* case); in 34 counties in and near the "Panhandle" region of Texas (the *Zinser* case); and in Curry County, New Mexico (the *Spearman* case). The *Cleveland* plaintiffs are petitioners in no. 81-1036, and the *Zinser* and *Spearman* plaintiffs have joined as petitioners in no. 81-1021. All respondents are defendants in the *Cleveland* case; only respondents Continental Grain Company and Clarence Palmby are parties in *Zinser* and *Spearman*. The three actions were consolidated for pretrial proceedings in the United States District Court for the Western District of Oklahoma, under 28 U.S.C. § 1407, by the Judicial Panel on Multidistrict Litigation, in November 1973.

** "JA" refers to appellants' joint appendix filed in the Court of Appeals, and "Pet. App." to one of the appendices to the petitions filed in this Court.

tablishes that there is no basis for the charges contained in the petitions and that petitioners' claims on the merits rest upon unsupported allegations and innuendo. Such a record is plainly an insufficient factual basis for a close examination by this Court of the implications of the *Illinois Brick* rule in antitrust litigation.

In two brief visits to the United States in July and August 1972, Russian negotiators contracted in separate transactions with the six respondent grain companies to purchase a total of nearly 20 million tons of American wheat and corn. Cumulatively, it was the largest grain transaction in American history. S. Rep. No. 93-1033, 93d Cong., 2d Sess. 1, 67 (1974), reprinted in JA 286, 348. The swiftness and magnitude of the sales—and their later impact on the American wheat market—took the grain companies completely by surprise.

The undisputed evidence, including the deposition testimony of each of the principals involved in the grain trades, shows that respondents had no advance information concerning the sales and hence could not have conspired to suppress such information. For example, at the very time that respondent Continental Grain Company allegedly had advance word of the transaction and therefore should have been accumulating wheat for export, the undisputed record shows that the company was selling wheat, depleting its stocks and creating a net short position. SA 87, 125-26, 147.* Likewise, when the Russian buying mission arrived in New York to open negotiations, the company's top executives—far from awaiting them on the basis of advance information—were scattered abroad and unavailable. SA 31, 81-83, 126-28, 148.

As the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations concluded, after a year of staff investigations of the Russian sales:

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* "SA" refers to appellees' Supplemental Appendix filed in the Court of Appeals.

> "[T]he record does not reveal that anyone, either in the grain companies or in the Government service, had any advance notice as to the Russians' intentions and hence capitalized on inside information." JA 342.

In addition to the Senate Subcommittee, the Justice Department, the General Accounting Office ("GAO"), the Inspector General of the Department of Agriculture, and a House Committee all undertook investigations of the sales, and uniformly concluded that respondents had not misused inside information. The Comptroller General of the United States, after a GAO investigation of grain company profits on the 1972 sales, reported to Congress that the grain companies "either did not have inside information on Russian buying intentions or did not take advantage of any such information." SA 45.

Furthermore, the record demonstrates unequivocally that respondents did not communicate with each other regarding the sales. Far from conspiring with their market rivals, respondents acted consistently with normal and lawful practice in the grain trade, guarding their views about the sales as trade secrets not to be disclosed to anyone. SA 139-41. In addition, the evidence shows that information about the sales which petitioners claimed was "suppressed" was actually widely disseminated in the media. Throughout the spring and summer of 1972, an avalanche of newspaper and magazine articles disclosed crop disasters in the Soviet Union and speculated on and then reported the Russian purchases. Record on Appeal, Vol. 13 at 3650-3716.

Finally, petitioners' scandalous charges that respondent Clarence Palmby conspired with or passed advance information to respondent Continental are utterly undocumented and unfounded. After completion of its inquiry into the grain sales, the Justice Department wrote as follows to the Senate Subcommittee also investigating the sales:

> "[I]t should be noted that neither the Subcommittee hearings nor our earlier investigation adduced *even a scintilla of evidence* that Mr. Palmby provided inside information to Continental Grain Company or in any

other unlawful way placed that company in a favored position in the Russian Grain transactions." JA 309 (emphasis added).

The undisputed record demonstrates that Soviet-American discussions about grain credits—the alleged source of Mr. Palmby's advance information that the sales would take place—did not succeed until after Mr. Palmby's departure from the government. JA 293. Nor was Mr. Palmby in a position to deny an alleged Russian request to buy wheat directly from the United States Government, as petitioners insinuate. 81-1021 Pet. 5. It was and remains established American Government policy to use private grain sources whenever possible; in fact, before government-to-government sales could have been made, the Secretary of Agriculture was required by law to find that private commercial channels could not be used. 15 U.S.C. §§ 713a-13, 714c; SA 158-59, 196-97. The American Government has never taken the economic risk of selling wheat to Russia; both before and after 1972, all such sales have been made and all such risks have been borne by private exporters.

Consequently, petitioners' claims on the merits are without foundation. Respondents submit that this Court should not undertake a review of the pass-on rule in a case where the record contains no probative evidence of an antitrust violation.

Proceedings Below

Petitioners' complaints were filed between October 1972 and January 1973. 81-1036 Pet. App. 3. Petitioner farmers claimed that the alleged conspiracy enabled the respondent grain companies to purchase wheat at depressed prices from middlemen in the wheat distribution chain (for example local grain elevators), and that, as a result, the middlemen in turn offered lower prices for petitioners' wheat.* As the Court of Appeals found,

* We discuss here the claims of petitioners who did not sell wheat directly to any of the respondent grain companies. The claims of the remaining members of the plaintiff classes who did sell directly were dismissed without prejudice and are not at issue in this petition. Several direct sellers filed new actions which are now being litigated in the District Court.

"according to the complaints since the middlemen sold wheat to the grain exporters at lower prices than would have been paid if the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices. It was on this general theory that [petitioners] claimed antitrust violations and treble damages." *Id.* at 5.

The wheat distribution chain in which petitioners and respondents take part consists of many layers, including thousands of local and regional elevators—both co-ops and independents—plus countless dealers, brokers and processors. SA 11-14. Petitioners are at one end of the chain and respondents at the other; between them are numerous middlemen. To prove the existence and amount of their alleged injury, therefore, each petitioner would have to prove precisely how much of the alleged "undercharge" was absorbed by each middleman who bought and resold his crop, and how much that middleman was able to "pass on", in the form of reduced prices, to the next level in the chain.

In July 1977, after extensive discovery on the merits was completed, respondents moved for summary judgment dismissing the complaint, on several grounds. Respondents argued, *inter alia*, that petitioners' claims should be dismissed under the decision the previous month in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). *Illinois Brick* involved the claims of indirect purchasers of concrete block, who alleged that defendant manufacturers had conspired to fix the prices at which defendants sold to middlemen. Plaintiffs in *Illinois Brick* sued to recover alleged overcharges "passed on" from defendants, through the middlemen, and finally to them. This Court held that claims of indirect, passed-on injury in the distribution chain for a product could not be maintained by persons removed from the alleged antitrust violators and dismissed that suit.

Respondents' summary judgment motion precipitated a lengthy and painstaking review of the factual and legal issues

relating to *Illinois Brick*. Discovery was reopened and extensive new briefs were filed. After a full-day hearing, during which petitioners were repeatedly called on to offer any evidence that would take them outside the ambit of *Illinois Brick*, the District Court held in June 1979 that petitioners' claims must be dismissed under *Illinois Brick*.* A unanimous panel of the Court of Appeals affirmed, and denied petitions for rehearing and suggestions for rehearing *en banc*. 81-1036 Pet. App. 18.

Both courts found that petitioners alleged precisely the type of indirect, pass-on injury considered by this Court in *Illinois Brick*. In addition, the two courts found that, in spite of a generous opportunity to take discovery and present evidence on these issues, petitioners had failed to make any factual showing to distinguish the case from the holding of *Illinois Brick* or to bring themselves within either of the two exceptions articulated in *Illinois Brick*.**

Consequently, the claims of all petitioners who had not sold wheat directly to a respondent were dismissed with prejudice

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* The District Court did not reach the other grounds of respondents' summary judgment motion. Those other grounds were: (1) that discovery had produced no evidence to support any of the essential allegations of petitioners' claims that respondents participated in a conspiracy, or possessed inside information; (2) because information about the Russian sales was public long before and throughout the relevant period, petitioners could not conceivably have been injured by an alleged conspiracy to "suppress" such information; (3) as a matter of law, the alleged conspiracy could not constitute an antitrust violation, *see Arizona* v. *Cook Paint and Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on the opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); and (4) petitioners' claims of conspiracy among the grain companies and government officials are barred under the *Noerr-Pennington* doctrine.

** These exceptions are relevant where plaintiffs demonstrate (1) that there are pre-existing, fixed-quantity, cost plus contracts between purchasers and sellers at each level of the distribution chain (the "cost-plus contracts" exception); or (2) that the middlemen in the distribution chain are owned or controlled by the alleged antitrust violator (the "owned or controlled" exception). No such showing has been made here.

under *Illinois Brick*.* In addition, petitioners' unusual requests for awards of attorneys' fees were denied by the District Court and the Court of Appeals, on the ground that unsuccessful litigants have no legal right to such recoveries.

SUMMARY OF ARGUMENT

The decisions of the courts below represent an unexceptional application of the rule of *Illinois Brick*. As those courts found, petitioners claim precisely the kind of indirect, "pass-on" injury alleged in *Illinois Brick*, and the wheat distribution chain presents the same kind of complexities considered there. This case raises no significant or difficult issues regarding application of the pass-on rule worthy of review by this Court.

There is no conflict among the circuits. Instead, the federal courts have applied *Illinois Brick* in a regular and consistent manner, and the decisions rendered in this case are in full accord with other courts which have construed *Illinois Brick*.

The claim of petitioners in 81-1021 that attorneys' fees should be awarded to counsel for an unsuccessful class is wholly without merit.

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* The District Court also held, in its discretion, that the comparatively few farmers who sold directly to a defendant did not constitute a proper class, and dismissed their claims, without prejudice to the filing of individual actions. That holding, which was affirmed by the Court of Appeals, is not challenged here.

REASONS FOR DENYING THE WRIT

I

THIS CASE PRESENTS A STRAIGHTFORWARD APPLICATION OF THE *ILLINOIS BRICK* RULE, RAISING NO ISSUE WORTHY OF REVIEW BY THIS COURT

Petitioners' central contention is that both the District Court and the Court of Appeals "expanded and seriously misapplied" this Court's decision in *Illinois Brick* (81-1036 Pet. 5). However, despite petitioners' awkward attempts to characterize their claims otherwise, it is plain that those claims fall squarely within the *Illinois Brick* rule. Petitioners' request that this Court invoke its power of supervision to correct the "incredible error" of the courts below (*id.* at 14) should therefore be denied.

Illinois Brick bars claims for injury allegedly passed on indirectly from the antitrust violator, through one or more middlemen in the chain of distribution, to the plaintiff. It was expressly found below that petitioners' claims here stem from just such "passed-on," indirect injury. The Court of Appeals found that the claimed injury arose—if at all—in the following manner:

> "[S]ince the middlemen sold wheat to the grain exporters at lower prices than would have been paid if the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices." 81-1036 Pet. App. 5.

This determination below was unquestionably correct. Because petitioners never dealt directly with respondents, petitioners could have been injured *only* if the middlemen with whom they did deal passed along a fraction of the alleged "undercharge" to them. Their contention is that farmers were

paid an unfairly low price by middlemen because the middlemen were receiving an unfairly low price on resale to the grain exporters. Indeed, if no such "pass-on" took place, petitioners would not have been injured at all, and would have no claim against the exporters. Consequently, petitioners' claims are fully analogous to the claims barred in *Illinois Brick*.

This Court's holding in *Illinois Brick* stemmed in part from its concern about the evidentiary complexities generally created by an effort to prove such indirect claims. Based on that concern, the Court adopted an across-the-board rule against all indirect claims, expressly rejecting attempts to "carve out exceptions to the [pass-on] rule for particular types of markets." 431 U.S. at 744. As the Court explained, "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the . . . rule was meant to avoid" (*id.* at 744-45).

There is no reason to re-examine that prophylactic rule here, because the very evidentiary complexities which led to the *Illinois Brick* holding are present in this case. The Court of Appeals found that the wheat distribution chain—through which petitioners would have to trace the alleged "undercharge", step by step, in order to calculate their damages—is at least as complex as the concrete block market which was at issue in *Illinois Brick*:

> "The distributive chain in *Illinois Brick*, therefore, resembles that which often exists in the wheat industry, at least in the number of links in the distributive chain. The wheat farmers often sell to county grain elevator companies, which, in turn, sell to larger companies, which sell to the defendants. This is not always true, since, in some cases, farmers sell directly to the defendant grain companies.* In other cases, farmers deal directly with farmer

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* In the case of such direct claims, it was held below, independent actions may be brought.

> cooperatives. Also, the wheat sometimes is handled by only one middleman, who, in turn, deals with the defendants. As indicated, however, in many cases there are four links in the distributive chain, just as there are in the concrete block industry which was scrutinized in *Illinois Brick*." 81-1036 Pet. App. 10 n.8.

If petitioners were allowed to maintain their claims, it would be necessary to determine, at each level in this complex distribution chain, to what extent the price received by a farmer resulted from the middleman's labor costs or profit margins, or other economic factors, and to what extent it was attributable to the alleged activities of respondent exporters at the distant end of the distribution chain.*

Consequently, the courts below concluded without difficulty that both the holding and the rationale of *Illinois Brick* apply to petitioners' claims.

The lower courts found only one factual difference between this case and *Illinois Brick;* here petitioners are indirect sellers of the allegedly price-fixed good, rather than indirect buyers as in *Illinois Brick*. However, the lower courts properly found that the rationale of *Illinois Brick* is applicable to buyers and sellers alike. There is no conflict among the circuits on this point. The Tenth Circuit here followed the decision of the Fifth Circuit in

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* By the same token, awarding indirect claimants such as petitioners a cause of action would bring into play the problem of multiple recovery which was another motivation for the *Illinois Brick* rule. That problem results from *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which held that alleged antitrust violators, when sued by middlemen who dealt directly with them, cannot reduce their liability by proving that the middlemen passed on a portion of the injury to the next level in the distribution chain. If defendants cannot use this defense, and must repay the full amount of any illegal overcharge or undercharge to a middleman (such as a country elevator), they would be subject to duplicative liability if indirect claimants, such as petitioners, could also sue. *Illinois Brick* solved this problem by concentrating the full amount of the claim in the middleman who dealt directly with the alleged violator, and denying indirect claimants a cause of action.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980), which held that *Illinois Brick* applied to the claims of indirect sellers.*

Petitioners do not quarrel with the principle that *Illinois Brick* applies equally to sellers' claims. Instead, in an effort to argue that *Illinois Brick* was "misapplied," petitioners contend that this is not a price-fixing case. They attempt to dress up their claim as alleging a grand "conspiracy to interfere with the natural workings of the entire competitive market and its forces of supply and demand. . . ." 81-1021 Pet. 13. Thus, petitioners declare that "the true market force [was] attended from outside the distribution chain which left the price of wheat suppressed to a range of prices which would exist if, in a freemarket [sic], there was a limited demand for wheat." *Id.* at 17 n.20. But all this is merely a clumsy way to say "price fixing". Price fixing is what petitioners alleged in all of their many complaints, and price fixing was the claim upon which the parties conducted discovery and litigated for seven years in the district court. And, of course, price fixing was precisely the claim which this Court considered, and rejected, in *Illinois Brick*.

Furthermore, petitioners' belated attempts to re-label their claims bring them right back within *Illinois Brick*. If, as petitioners contend, the alleged antitrust violation affected "the entire competitive market," how does the court determine

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* The Tenth Circuit held as follows on this point:

> "From *Illinois Brick*, we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator. We recognize that in *Illinois Brick* the plaintiffs were buyers, whereas, in the instant cases, the plaintiffs are sellers. Such fact, however, does not render the rule of *Illinois Brick* inapplicable. In the instant cases, the claim is that, because the defendants violated the antitrust laws, they were able to buy wheat at depressed prices from middlemen, and that the middlemen, in turn, purchased wheat from the plaintiffs at reduced prices. In *Illinois Brick*, an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, *i.e.*, one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities." 81-1036 Pet. App. 11.

the extent to which it fell on petitioners rather than the middlemen? And how are the respondents protected against multiple recovery when sued by middlemen claiming that, as part of the "entire competitive market," they too were hurt? It is just this pervasive effect which creates the problems of apportionment and multiple recovery which *Illinois Brick* sought to avoid.*

Consequently, even were this Court inclined to examine the application of the pass-on rule in a case where plaintiffs allege an antitrust violation different from that claimed in *Illinois Brick,* or where problems of complex economic proof and multiple recovery are minimized, this is not such a case.

In reality, then, petitioners seek not to correct a "misapplication" of *Illinois Brick*, but to overrule it. Petitioners frankly reveal their hostility to *Illinois Brick* when they state their mistaken belief that: "*Illinois Brick* itself is a sharp departure from prior precedent, and difficult to reconcile with those cases which emphasize the breadth of the remedy of the antitrust laws." 81-1021 Pet. 19. Petitioners come to bury *Illinois Brick,* not to enforce it.

In their search for a cert-worthy issue, petitioners make several other miscellaneous arguments, each unavailing. Petitioners in no. 81-1021 argue that this case is distinguishable from *Illinois Brick* because they have alleged that respondent Continental Grain Company "monopolized" the 1972 wheat sale to the Soviet Union, in violation of section 2 of the Sherman Act. 81-1021 Pet. 5. However, the District Court

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* Petitioners' erroneous reliance upon *Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711 (S.D.N.Y. 1981) (81-1021 Pet. 11-12, 18), is achieved only at the expense of a complete misstatement of the holding in that case. Unlike petitioners here, plaintiffs in *Pollock* dealt directly with the alleged violators. Petitioners state that, because plaintiffs in *Pollock* alleged "tampering with the entire market, the court did not bother to look for direct dealings to determine if plaintiffs could bring their cause of action." *Id.* at 12. But the *Pollock* Court stated just the opposite, finding as a fact that there was no question that "the plaintiffs and defendants . . . were in direct contact insofar as they were on opposite sides of the [relevant] market." 512 F. Supp. at 718 n.7.

found that "the [§] 2 claims of monopolistic practices can be disregarded as being surplusage," and refused to certify them for class treatment and merits discovery. JA 189. Consequently, these claims are not before this Court with respect to the absent members of the *Zinser* and *Spearman* class, and have not been subjected to discovery or development in the courts below. They present no significant issue worthy of review.

Most important, as the Court of Appeals noted (81-1036 Pet. App. 5 n.4), the section 2 claims at best allege the same pass-on injury claimed under section 1, and *Illinois Brick* applies to them in precisely the same manner. There is no conflict among the circuits on this point. In *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980), the Fifth Circuit rejected precisely the same argument which petitioners make here. "Because *Illinois Brick* adopted a unified 'mutuality' approach to passing-on problems, we must reject the appellants' argument that *Illinois Brick* has no application . . . insofar as they seek relief for violations of Section 2 of the Sherman Act." 600 F.2d at 1157.

Finally, apparently attempting to take advantage of the recognized exception to *Illinois Brick* which applies where middlemen are "owned or controlled" by the alleged antitrust violators, petitioners in no. 81-1036 mistakenly argue that farmers who sold their wheat to farmer cooperatives should be permitted to sue, on the theory that the cooperatives allegedly are owned and controlled by their farmer-members. But the "owned or controlled" exception to *Illinois Brick* applies only to entities controlled by the alleged violator, and *not* the alleged victim. The rationale for the exception is simply not present unless the prospective defendants, through their ownership or control of intermediaries in the distribution chain, would be in a position to insulate themselves from antitrust attack. Moreover, petitioners simply ignore the District Court's factual finding that the cooperative is an independent legal entity "separate and apart from its members," and its conclusion that petitioners failed to make a factual showing that the "owned or controlled" exception applies here. 81-1036 Pet. App. 24. Nor

do petitioners reveal that this point was never raised by them in the Court of Appeals. There is no justification for review of that issue here.

The conclusion is clear that there is no "misapplication" of *Illinois Brick* in this case, requiring the remedial grant of certiorari requested by petitioners.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners contend at some length (81-1021 Pet. 14-18; 81-1036 Pet. 9-14) that the decision below conflicts with earlier rulings of other federal courts of appeals. However, they fail to identify a single specific relevant issue upon which those courts differ. On the contrary, the lower federal courts have had little difficulty applying the *Illinois Brick* rule to claims of pass-on injury such as petitioners allege.* The Court of Appeals' decision here is in full accord with this substantial, consistent body of law.

In their attempt to create a conflict, petitioners in no. 81-1021 depend primarily upon a few sentences of dictum contained in a footnote in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 585 n.47 (3d Cir. 1979). (81-1021 Pet. 15.) In *Mid-West*, the Third Circuit actually followed *Illinois Brick*, affirming the dismissal of the antitrust claims of indirect purchasers of consumer bags, and the Tenth Circuit in this case cited the *Mid-West* decision with approval (81-1036 Pet. App. 13 n.10). Petitioners ignore the *Mid-West*

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* See, *e.g.*, *In re Plywood Antitrust Litigation*, 655 F.2d 627, 638-643 (5th Cir. 1981); *Jewish Hospital Ass'n of Louisville, Kentucky, Inc.* v. *Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *In re Sugar Antitrust Litigation*, 588 F.2d 1270 (9th Cir. 1978), *cert. denied sub nom. California & Hawaiian Sugar Co.* v. *California*, 441 U.S. 932 (1979); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 497 F. Supp. 218 (C.D. Cal. 1980); *Lefrak* v. *Arabian American Oil Co.*, 487 F. Supp. 808 (E.D.N.Y. 1980); *Int'l Ass'n of Machinists and Aerospace Workers* v. *Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd* 649 F.2d 1354 (9th Cir. 1981).

holding; however, even their carefully selected footnote does not support their position. That footnote observes merely that where a below-market fixed price is alleged by an antitrust plaintiff, some courts have awarded damages based upon the "amount of injury" suffered by plaintiffs, rather than an amount equal to defendants' presumed benefit. The *Mid-West* dictum does *not* state, as petitioners imply, that an indirect seller may recover for injury "passed-on" through a distribution chain. It obviously refers to antitrust injury qualitatively different from that alleged in *Illinois Brick*, and in this case.*

Petitioners in 81-1036 attempt to argue that the Tenth Circuit's decision cannot be squared with the Fifth Circuit's holding in *Beef Industry, supra,* claiming that "there is a conflict between these two Circuits in the application of the cost-plus exception" to *Illinois Brick*. This contention is apparently a reference to the fact that the Tenth Circuit here did not endorse the *Beef Industry* holding which defined a "functional cost-plus" exception to *Illinois Brick*. However, petitioners ignore the fact that the Tenth Circuit found it unnecessary to decide whether to accept the "functional cost-

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* Nor can petitioners find a conflict in *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980), and *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979), two district court cases which cite *Mid-West*. Neither case involved an antitrust claim remotely similar to that alleged here. In *Zenith*, one manufacturer of consumer electronics products sued a group of foreign competitors, alleging a conspiracy to drive domestic firms out of business. No such issue is involved here. The *Zenith* court readily concluded that *Illinois Brick* did not bar plaintiff's claims, because no pass-on theory of damages was involved (494 F. Supp. at 1253-1256). Unlike the situation here and in *Illinois Brick*, the alleged injury in *Zenith* did not arise from the price paid to or received by the plaintiff; as the court noted, plaintiff in *Zenith* did not "seek to trace the passing of an overcharge or undercharge through its distribution chain" (*id.* at 1254). Similarly, plaintiff in *Dart Drug* based its claim on the allegation that the "defendant permits certain of plaintiff's competitors on the retail level to purchase directly from defendant, while it does not afford plaintiff the same opportunity" (480 F. Supp. at 1096 n.7). Accordingly, the court found that pass-on was irrelevant to the case. Again, no such issue is present here or was involved in *Illinois Brick*.

plus" test, because it determined, based on the record presented, that petitioners do not come within the exception as outlined by the *Beef Industry* court. The Tenth Circuit unequivocally stated that: "Recognizing that the Fifth Circuit in *Beef Industry* held that plaintiffs came within an exception to the rule of *Illinois Brick*, we do not believe the plaintiffs in the instant case have brought themselves within any such exception." 81-1036 Pet. App. 12-13. Hence, this "conflict" is illusory.*

Petitioners also maintain (81-1021 Pet. 16; 81-1036 Pet. 10-13) that the Tenth Circuit's decision conflicts with *In re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980), *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), and *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). A brief examination of these holdings shows that they are inapposite.

In *Fine Paper*, direct purchasers assigned to the indirect purchaser their antitrust claims arising from the sellers' alleged price-fixing conspiracy. Because of the assignment, the indirect purchaser stood in the position of the direct purchasers, and the court permitted the claims to proceed. 632 F.2d at 1088-

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* Petitioners in No. 81-1036 also argue (Pet. 11) that the Tenth Circuit's decision conflicts with *Beef Industry* because "[c]attle ranchers were granted standing to pursue their antitrust claim[,] but wheat farmers were denied standing." This overly simplistic approach ignores the distinctions between the procedural posture of the two cases and between the facts established in the district court records. The Court of Appeals in *Beef Industry*, reviewing a dismissal on the pleadings, concluded that plaintiffs had alleged sufficient facts to bring their claims within the "cost-plus contract" exception to the *Illinois Brick* rule and should be given an opportunity to prove such facts at a hearing. 600 F.2d at 1163-1167. By contrast, the District Court and the Court of Appeals in the present case, reviewing a voluminous factual record on a motion for summary judgment, determined that petitioners failed to show—in their papers or at the hearing—"pre-existing, fixed-quantity, cost-plus contracts at each level of distribution" between respondent grain companies and petitioners (Pet. App. 27a; see also *id.* at 14a). Even now, petitioners have not identified any facts that might suggest the existence of such contracts, or offered any reason why this Court should review a factual determination made in the District Court and unanimously affirmed by the Tenth Circuit.

1090. Here, of course, no direct sellers to respondent grain companies have assigned their claims to petitioners.

The Court of Appeals in *Royal Printing* relied on *Illinois Brick* in sustaining the dismissal of most of plaintiffs' price-fixing claims. The court held, however, that one plaintiff, which had purchased paper products directly from a wholesaling subsidiary of one defendant-manufacturer and from a wholesaling division of another, should be allowed to proceed with its suit. This aspect of the decision was a simple application of the "owned or controlled" exception to the pass-on rule which was recognized by the *Illinois Brick* court. The *Royal Printing* court allowed plaintiff to maintain its claim because defendant-manufacturers controlled the wholesaling subsidiary and division that directly purchased their paper products, and then resold them to plaintiff. No such justification exists here. Petitioners have not established—and, indeed, do not contend in this Court—that the intermediaries to which they sold wheat were owned or controlled by the respondent grain companies.

Finally, *Fontana Aviation* is distinguishable because, as the court there found, it does not "fit within the *Illinois Brick* mold of an indirect purchaser suing the manufacturer for an overcharge" (617 F.2d at 481). The plaintiff in *Fontana* charged instead that defendants Cessna Aircraft Company, its financing subsidiary, and its independent retail dealers had conspired to drive the plaintiff out of business. There was no allegation of a conspiracy among competitors to extract excessive profits from persons at other levels in the chain of distribution. Rather, plaintiff in *Fontana* was a competitor of Cessna, from whom Cessna allegedly sought to take business. No pass-on was involved.

In sum, instead of conflict, these cases show a pattern of consistent and correct application of this Court's *Illinois Brick* decision. There is consequently no reason to grant these petitions.*

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* Petitioners' claim for expenses, costs, and attorneys' fees (81-1021 Pet. 24-25) is wholly without merit. As the District Court and the

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: January 25, 1982

Respectfully submitted,

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Court of Appeals correctly held (Pet. App. 17a, 41a-44a), petitioners did not prevail in their lawsuits and they did not confer any benefit on the members of the classes they represented. Under these circumstances, they are not entitled to attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. 15, or under any equitable exception to the American rule that unsuccessful litigants must pay their own fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The assertion of petitioners' attorneys that the doctrine of *quantum meruit* authorizes an award, because their legal services "would have been productive," but for this court's holding in *Illinois Brick*, is pure fancy.

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APPENDIX

APPENDIX

STATEMENTS OF CORPORATE RESPONDENTS PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of this Court, Continental Grain Company, by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:*

Ghent Grain Termina N.V.
Sobelgra
Dairy Enterprises Ltd.
Seacon Trading
Sociedad De Armazanagem E Embarque
De Graneis Soli "Gransol"
Depositos A Granel S.A.
Chai Tai Conti Limited
Molinos Champion, S.A.
Molinos Del Ecuador, C.A.
Interamericana De Tejidos, S.A.
Immobiliaria Consam
Ecuatoriana De Desarrollo S.A.
Industrias Harineras Guaxaquil S.A.
Hansa—Lagerhaus Stron, K.G.
DC Schiffahrt Poseldorf
DC Schiffahrt Pax
ContiHellas S.A.
Caribbean-Agro Industries, Limited
Continental Furness Ontwikkelings N.V.
Continentalmare
Magazzini Generali Lombardi Lungavilla
I.C.I.C. Ancona

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* Continental Grain Company is reviewing its records to determine if this list is incomplete, and will make a supplemental presentation to the Court if it so determines.

Ste Martiniquaise De Distribution De Fariness Et Al "Somadifac"
Proma
Coloidales Duche S.A.
Molinera Inca, S.A.
Sociedad Anonima Distribuidora "Sada"
Silos De Tarragona, S.A.
Promociones De Montana, S.A.
Transportes De Montana, S.A.
Interfood Espanola, S.A.
Foodpack, S.A.
Acrites Y Proteinas, S.A.
Transformaciones Agrarias Extremenas, S.A.
Manipulaciones Especiales Y Transportes, S.A.
Penibetica De Almacenajes, S.A.
Irunesa De Silos, S.A.
Alemaenes Y Descargas De Valencia, S.A.
Algra, S.A.
Maicerias Espanolas, S.A.
Silos Del Noroeste
Farinasa
Commercio Internacional Luso, Espanol, S.A.
Finagrain Trading S.A.
Arabfin
Agrocoum, S.A.
Avsco—Avigultura—Comerico E. Industria S.A.
Societe Mix le des Silos Du Port de Strasbourg
Karl Gross Silo—GMBH Brake
Pacific Seeds (THAI) Ltd.
Pacific Seeds (Philippines) Inc.
Conpe S.A.
Thermocatalitic Corporation
Santek Inc.
Russell Feed Company

Tietz Feed & Supply Company
Pork-O-Rama Research
Arkansas Protein
Conti-Fleeting
East Bank Fleeting Inc.
Birds Point Terminal Inc.
Old Holland Brewing Company
Producers Grain Corporation
Produce Exchange Realty Trust
Terminal Commercial Co.
Admiral Fund Ltd.
Conti Capital I
Conti Capital II

Pursuant to Rule 28.1 of this Court, Louis Dreyfus Corporation, by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Parent Companies

Louis Dreyfus Corporation is a wholly-owned subsidiary of Louis Dreyfus Holding Company, Inc., which in turn is a wholly-owned subsidiary of S.A. Louis Dreyfus et Cie.

Pursuant to Rule 28.1 of this Court, Cook Industries, Inc., by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

None. The current name of Cook Industries, Inc. is Cook International, Inc.

Pursuant to Rule 28.1 of this Court, Garnac Grain Co., Inc., by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Subsidiaries

ADNAC, Inc.